

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANDREA SOMMERS and HARRY SUEISHI,
as Guardians of EDITH SELF, an Adult Ward,

Plaintiffs,

v.

DANIEL C. CUDDY, JR., individually and as
President, Secretary, Treasurer, and Director
of Personnel Benefits Group, Inc.;
PERSONNEL BENEFITS GROUP, INC., a
Nevada Corporation d/b/a Personnel Benefits
Group and Retirement Benefits Group; AVIVA
USA CORPORATION, an Iowa corporation,
f/k/a and/or d/b/a Amerus Group Co.; AVIVA
LIFE AND ANNUITY COMPANY, an Iowa
corporation, f/k/a and/or d/b/a Amerus Life
Insurance Company, AMERUS ANNUITY
GROUP CO., a Kansas corporation;
AMERICAN INVESTORS LIFE INSURANCE
COMPANY, INC., a Kansas corporation;
NATIONAL WESTERN LIFE INSURANCE
COMPANY, a Colorado corporation; DOE
DEFENDANTS I-XXX; ROE
CORPORATIONS I-XXX, inclusive.

Defendants.

2:08-cv-78-RCJ-RJJ

ORDER

Currently before the Court is Defendants' Daniel C. Cuddy Jr. and Personnel Benefits Group, Inc.'s Motion for Clarification (#79). The Court heard oral argument on June 20, 2011.

DISCUSSION

Plaintiffs Andrea Sommers and Harry Sueishi, as Guardians of Edith Self an adult ward, (collectively referred to herein as "Plaintiffs") filed a Complaint in this action on January 18, 2008. In their Complaint, Plaintiffs assert that they are seeking to "halt the use of unfair and abusive practices by Defendants in marketing and selling unsuitable annuity policies to senior

1 citizens.” (Complaint (#1) at 2). According to Plaintiffs, “Defendants designed a scheme
2 specifically to exploit and prey upon the finances of vulnerable senior citizens.” Id. Plaintiffs
3 further assert that “Defendants accomplished their scheme by utilizing the deceptive marketing
4 of estate or financial planning services in order to obtain the seniors’ financial information.”
5 Id.

6 Plaintiffs assert that the Defendants’ alleged fraudulent scheme began to target Edith
7 Self (“Self”) in 1999. Id. at 5. According to Plaintiffs, Defendants Daniel C. Cuddy, Jr.
8 (“Cuddy”) and Personnel Benefits Group, Inc. (“PBG”) “identified Self as a lonely, mentally
9 unfit, elderly widow, with no immediate family members.” Id. Thereafter, according to
10 Plaintiffs, the Defendants “began a sophisticated and fraudulent scheme to defraud Self by
11 gaining her trust” with the purpose of gaining access to “Self’s substantial assets and
12 property.” Id. Based on these allegations, Plaintiffs filed suit asserting claims for: (1) violation
13 of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961, et
14 seq.; (2) violations of Nevada consumer protection laws; (3) breach of fiduciary duty; (4) aiding
15 and abetting breach of fiduciary duty; (5) bad faith; (6) fraudulent misrepresentation; (7)
16 negligent misrepresentation; (8) fraudulent inducement/fraud; (9) civil conspiracy; and (10)
17 unjust enrichment.

18 Following the filing of Plaintiffs’ Complaint, Defendants Cuddy and PBG filed a Motion
19 to Compel Arbitration and Stay Proceedings (#36) on May 8, 2008. Defendants Aviva USA
20 Corporation, Aviva Life and Annuity Company, Amerus Annuity Group Company, and
21 American Investors Life Insurance Company (collectively referred to herein as the “Aviva
22 Defendants”) also filed a Motion to Compel Arbitration and Stay Proceedings (#43).
23 Defendant National Western Life Insurance Company (“National”) filed a Joinder to the
24 Motions to Compel Arbitration and Stay Proceedings (#39).

25 On March 30, 2009, the Court entered an Order (#62) granting the foregoing motions
26 to compel arbitration. In its Order, the Court noted that Defendants moved to compel
27 arbitration pursuant to the Federal Arbitration Act and the alleged agreements entered into
28 between the parties. According to the Court, Defendants provided evidence of agreements

1 signed by Self that contained arbitration provisions. These agreements were executed by Self
2 in 2002 and 2003. Plaintiffs challenged the alleged agreements on the basis that Self was
3 “mentally unfit” at the time she signed the contracts and that the entire agreements were in
4 “question and under intense suspicion.” The Court stated that it was “clear from Plaintiffs’
5 argument that Plaintiffs [were] challenging the enforcement of the contract as a whole and not
6 just the arbitration provision.” (Order (#62) at 5). The Court noted that Plaintiffs argued “that
7 Self lacked the mental capacity to enter into any of the agreements at the time they were
8 executed, and that Self was coerced into signing the agreements.” *Id.* Based on Plaintiffs’
9 argument, the Court found that under Supreme Court authority, the Court was required to
10 direct the parties to proceed to arbitration because Plaintiffs challenged the validity of the
11 entire agreement and not just the arbitration clause.

12 Following the Court’s Order, Plaintiffs moved this Court for reconsideration on
13 December 31, 2009. Upon reconsideration, the Court found that, as a matter of contract, the
14 agreement between the parties did not create “a duty to arbitrate the issue of whether Edith
15 Self had the mental capacity to enter into an agreement with the Defendants.” (Order (#78)
16 at 6). The Court noted that the arbitration provision at issue stated that “all controversies that
17 may arise between the parties *concerning performance or breach* of this Agreement . . . shall
18 be determined by arbitration.” (Order (#78) at 6). Based on this language, the Court held that
19 “Edith Self’s mental capacity to enter into a contract does not relate to the performance or
20 breach of the agreement.” *Id.* at 6-7. Thus, “whether a contract was entered into between Self
21 and the Defendants is a matter for the Court to decide.” *Id.* at 7.

22 In their motion for clarification, Defendants state that based on the Court’s order, they
23 understood that the Court intended to summarily proceed on the issue of Edith Self’s mental
24 capacity under Section 4 of the FAA. After determining that issue, the Court would then
25 determine whether it should compel arbitration. Plaintiffs, on the other hand, argue that the
26 Court’s order provides that the entire proceeding, including the underlying causes of action,
27 should proceed before the Court. (Opp’n to Motion for Clarification (#80) at 2). According to
28 Plaintiffs, Section 4 of the FAA does not apply, “and the case, as a whole, should be litigated

1 pursuant to the Federal Rules of Civil Procedure.” *Id.*

2 As noted in this Court’s previous Order, the Federal Arbitration Act (“FAA”) provides that
3 agreements to arbitrate disputes “shall be valid, irrevocable, and enforceable, save upon such
4 grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Section
5 4 of the FAA provides for the petition to a district court for an order compelling arbitration when
6 a party fails to arbitrate under an agreement. Under Section 4, “[a] party aggrieved by the
7 alleged failure, neglect, or refusal of another to arbitrate under a written agreement for
8 arbitration may petition any United States district court . . . for an order directing that such
9 arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. Under that
10 provision, “[i]f the making of an arbitration agreement or the failure, neglect, or refusal to
11 perform the same be in issue, the court shall proceed summarily to the trial thereof.” *Id.* If it
12 is found that “no agreement in writing for arbitration was made or that there is no default in
13 proceeding thereunder, the proceeding shall be dismissed.” *Id.* However, if it is found “that
14 an agreement for arbitration was made in writing and that there is a default in proceeding
15 thereunder, the court shall make an order summarily directing the parties to proceed with the
16 arbitration in accordance with the terms thereof.” *Id.*

17 In this matter, the Court clarifies its order to hold that the claims asserted in Plaintiffs’
18 Complaint are to be determined by the Court. As noted in the Court’s previous Order (#78),
19 the arbitration provision relates specifically to controversies arising between the parties on the
20 issues of performance or breach of the agreements. The claims for relief asserted by
21 Plaintiffs, on the other hand, involve RICO, breach of fiduciary duty, bad faith, fraudulent
22 misrepresentation, negligent misrepresentation, fraud, civil conspiracy and unjust enrichment.
23 Because Defendants have not tied these claims to the performance and breach of the
24 agreements at issue, the Court does not need to compel arbitration under the FAA.

25 ///

26 ///

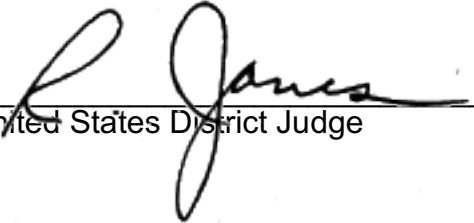
27 ///

28 ///

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the Court GRANTS the Motion to Clarify its Order (#79) and finds that the arbitration provision does not relate to the claims asserted by Plaintiffs, and litigation on the underlying claims shall commence before the Court.

DATED: This 5th day of July, 2011.


United States District Judge